OCBC Bank (M) Bhd v Au Kee Sian & Anor

HIGH COURT (PULAU PINANG) — ORIGINATING SUMMONS NO 24–1488 OF 2000

KAMALANATHAN RATNAM J

28 OCTOBER 2002

Banking *— Securities for advances — Charge — Application by plaintiff for order for sale of land — Plaintiff agreed to third party borrower's request that borrowing would be gradually reduced and that charge would be discharged — Plaintiff granted further extension of facilities to third party borrower on security of existing charge — Whether conduct of plaintiff in giving further credit to third party borrower after agreeing with the borrower's proposal had satisfied court that grant of an order for sale would be contrary to equity and good conscience — Whether defendant demonstrated that grant of order for sale would be contrary to rule of law or equity*

Land Law *— Charge — Order for sale — Cause to the contrary — Plaintiff agreed to third party borrower's request that borrowing would be gradually reduced and that charge would be discharged — Plaintiff granted further extension of facilities to third party borrower on security of existing charge — Whether conduct of plaintiff in giving further credit to third party borrower after agreeing with the borrower's proposal had satisfied court that grant of an order for sale would be contrary to equity and good conscience — Whether defendant demonstrated that grant of order for sale would be contrary to rule of law or equity — National Land Code 1965 s 256(3)*

This was an application for an order for sale of a piece of land ('the said land') charged by the defendant to the plaintiff as security for various banking facilities granted by the plaintiff to one Meko Offset Printing Sdn Bhd ('the borrower'). By a letter dated 18 April 1995 (copied to the defendant), the borrower informed the plaintiff that the borrower's shareholders had agreed, in an extraordinary general meeting, to reduce the facilities over a period of time, such that by 31 January 1998, the charge over the said land would be fully redeemed and discharged. The plaintiff agreed to comply with the defendant's request. It was the plaintiff's case that the borrower had not paid the sums due and as such, the plaintiff could not gradually reduce the debt as requested by the borrower in its letter of 18 April 1995. On the other hand, the defendant had exhibited the plaintiff's bank statements, which showed that payments amounting to RM205,000 had been paid by the borrower and that as of 31 August 1998, the amount outstanding was only RM74,199. The defendant contended that since this was a third party charge and since the borrower had indicated that by 31 January 1998, the borrowing would have been gradually reduced so that by that date, the said property would be fully redeemed and discharged, the plaintiff had no right to grant any further extension of the facilities on the security of the said charge.

Held, dismissing the plaintiff's application:

All that the defendant had to show was that there was a cause to the contrary pursuant to s 256(3) of the National Land Code 1965 ('NLC'). The conduct of the plaintiff in giving further credit to the borrower after agreeing with the borrower's proposal, as indicated in the borrower's letter of 18 April 1995, had satisfied the court that the grant of an order for sale would be contrary to equity and good conscience as the defendant could demonstrate that the grant of the order for sale would be contrary to some rule of law or equity (see pp 110A, G, 112F–G).

[Bahasa Malaysia summary

Ini merupakan permohonan untuk perintah jual ke atas sebidang tanah ('tanah tersebut') yang digadai oleh defendan kepada plaintif sebagai cagaran untuk pelbagai kemudahan perbankan yang diberi oleh plaintif kepada Meko Offset Printing Sdn Bhd ('peminjam'). Melalui sepucuk surat bertarikh 18 April 1995 (yang disalin kepada defendan), peminjam memaklum kepada plaintif bahawa pemegang saham peminjam telah bersetuju, dalam satu mesyuarat am luar biasa, untuk mengurang kemudahan-kemudahan sepanjang satu jangkamasa, hinggakan pada 31 Januari 1998, gadaian ke atas tanah tersebut akan ditebus dan didiscaj sepenuhnya. Plaintiff bersetuju mematuhi permintaan defendan. Ia merupakan kes plaintif bahawa peminjam tidak membayar jumlah yang terhutang dan dengan demikian, plaintif tidak boleh mengurang hutang secara beransur-ansur seperti yang diminta oleh peminjam dalam suratnya bertarikh 18 April 1995. Sebaliknya, defendan telah mengekshibitkan pernyataan bank plaintif, yang menunjukkan bahawa bayaran berjumlah RM205,000 telah dibayar oleh peminjam dan bahawa pada 31 Ogos 1998, amaun yang terhutang hanyalah RM74,199. Defendan berhujah bahawa oleh kerana ini merupakan gadaian pihak ketiga dan oleh kerana peminjam telah menandakan bahawa pada 31 Januari 1998, pinjaman telah dikurangkan secara beransur-ansur hinggakan pada tarikh itu, harta tersebut sudah pun ditebus dan didiscaj sepenuhnya, plaintif tidak berhak memberi apa-apa perlanjutan kemudahan atas cagaran gadaian tersebut.

Diputuskan, menolak permohonan plaintif:

Apa yang perlu ditunjuk oleh defendan adalah bahawa wujudnya sebab bertentangan menurut s 256(3) Kanun Tanah Negara 1965 ('KTN'). Kelakuan plaintif dalam memberi kredit lanjut kepada peminjam selepas bersetuju dengan cadangan peminjam seperti yang ditunjukkan dalam surat peminjam bertarikh 18 April 1995, telah memuaskan mahkamah bahawa pemberian perintah jual akan bertentangan dengan ekuiti dan kehendak batin baik kerana defendan

boleh menunjukkan bahawa pemberian perintah jual akan melanggar rukun undang-undang atau ekuiti (lihat ms 110A, G, 112F–G).]

Notes

For cases on charge as securities for advances, see 1 *Mallal's Digest* (4th Ed, 1998 Reissue) paras 1429–1446.

For cases on order for sale, see 8 *Mallal's Digest* (4th Ed, 2001 Reissue) paras 1939–2020.

Cases referred to

Low Lee Lian v Ban Hin Lee Bank Bhd [1997] 1 MLJ 77 (folld)

PhileoAllied Bank (M) Bhd v Narendran Thambimuthu [1998] 8 CLJ 394 (refd)

Legislation referred to

National Land Code 1965 ss 256(3), 340

Christina Siew (*Lim Kian Siew & Cog*) for the plaintiff.

LK Saw (*Saw Lip Khai & Co*) for the first defendant.

Kamalanathan Ratnam J:

Facts

The plaintiff bank granted various banking facilities to one Meko Offset Printing Sdn Bhd ('the borrower'). In consideration thereof, the defendants created a third party charge over land held under Lot No 2764, Geran No 29426, Bandar Tanjong Bungah, Daerah Timor Laut, with a house No 34, Jalan Azyze Hillside, 11200, Tanjung Bungah, Pulau Pinang situated on it ('the said property') in respect of the said banking facilities in favour of the plaintiff. Since the borrower defaulted in the payments, the plaintiff commenced these foreclosure proceedings.

Findings of the court

All that the defendants had to show was that there was a cause to the contrary pursuant to s 256(3) of the National Land Code 1965 ('the NLC'). The task of this court has been made much simpler after the decision of the Federal Court in *Low Lee Lian v Ban Hin Lee Bank Bhd* [1997] 1 MLJ 77 which held that 'cause to the contrary' within the meaning of s 256(3) of the NLC might be established only in three categories of cases namely:

(i) when a chargor was able to bring his case within any of the exceptions to the indefeasibility doctrine in s 340 of the NLC;

(ii) when a chargor could demonstrate that the chargee had failed to meet the conditions precedent for the making of an application for an order for sale; and

A (iii) when a chargor could demonstrate that the grant of an order for sale would be contrary to some rule of law or equity.

In this case, the defendants referred me to a letter from the borrower dated 18 April 1995 addressed to the plaintiff and copied to the defendants which reads as follows:

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The Vice-President/Manager,
OCBC Bank Berhad,
Beach Street,
Penang.

Dear Sir,

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A/C No: 7301-062630-01

We have the pleasure to inform you that during our BGM held on 6 April 1995 we have come to resolve the followings:

That the company's bank borrowing with you pledged under third party charge on property at No 34, Jalan Azyze, Tanjung Bungah, Hillside, Penang, to be reduced as follows:

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1 (a) By 31 December 1995 borrowing to be reduced by RM50,000.

(b) By 31 December 1966 borrowing to be reduced by another RM100,000.

E (c) By 31 December 1997 borrowing to be reduced by another RM100,000.

(d) By 31 January 1998 the property to be fully redeemed and discharged.

2 The company shall limit from issuing cheques exceeding the RM380,000 limit granted by your bank.

F Kindly abide to our above requests which shall take immediate effect from the date hereof and keep us informed from time to time on our credit limit. And also, we request you to inform the owners of the property from time to time, as and when, the limit is scaled down.

Thank you.

Yours faithfully,
For & on Behalf of
G Meko Offset Printing Sdn Bhd

sgnd Managing Director

cc Au Kee Sian
cc Mdm Ngiam Seng Lian

H The bank agreed to do so by its letter dated 18 January 1996 which reads as follows:

Our ref: QKS/CBE

18 January 1996

I Memo Offset Printing Sdn Bhd
110 Kampung Java Baru
Off Jalan Dato Kramat
10150 Penang

Dear Sirs,

Re: Overdraft Facility of RM380,000
(Account No: 730-106263-0)

As requested we have today reduced the OD limit from RM380,000 to RM330,000.

2 Kindly operate your accounts within the limit of RM330,000.

Yours faithfully,
sgnd
Quah Kim Swee
Assistant Manager

It is the plaintiff's case that since the borrower had not paid the sums due, the bank therefore could not gradually reduce the debt. But this is not true because the defendants had exhibited the plaintiff's bank statement of the borrower which showed that as of 31 August 1998, the borrower had indeed made various payments amounting to RM205,000 thereby reducing the debt as of that date to RM74,199.26. In spite of the first defendant having sent a letter dated 5 May 1999 to the plaintiff in which the first defendant had reminded the plaintiff that pursuant to the plaintiff's own solicitor's letter dated 22 July 1999, the outstanding sum due under the letter of credit account was only RM262,000 and whereby the first defendant sought a breakdown of all the unpaid letters of credit and their respective dates of issue, the plaintiff did not respond.

It is the defendants' contention that since this is a third party charge and since the borrower had indicated that by 31 January 1998, the borrowing would have been gradually reduced so much so that by that date the said property would be fully redeemed and discharged, the plaintiff had no right to grant any further extension of the facilities on the defendants' charge. In my view, the conduct of the plaintiff in giving further credit after agreeing with the borrower's proposal as contained in the borrower's letter dated 18 April 1995, clearly has satisfied this court that the grant of an order for sale would be contrary to equity and good conscience as envisaged under category (iii) by the Federal Court in *Low Lee Lian*. Whilst the plaintiff had cited numerous authorities to show that the defendants had by the terms of the charge signed away their contractual rights, I must hasten to add that even if that be so, the borrower's letter dated 18 April 1995 and the bank's agreement to comply dated 18 January 1996, have, in my view, protected the rights of the defendants.

In *PhileoAllied Bank (M) Bhd v Narendran Thambimuthu* [1998] 8 CLJ 394, I had held that on an application for sale of land charged, the court has not only to apply the law but also to invoke the aid of equity in order to be satisfied whether 'cause to the contrary' has been shown. The chargee must not only come to court with proof that the chargor has defaulted but also with proof that the chargee himself is free of fault and that he was not guilty of any unreasonable conduct, and that there was no right of innocent third parties to be affected by the order.

A Applying that same principle to this case, I dismissed the plaintiff's application with costs.

Plaintiff's application dismissed.

Reported by Lim Lee Na

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